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November 15, 2005

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: SBC Communications, Inc. Petition for Waiver of Section 61.42 of the Commission's Rules, WC Docket No. 03-250

Dear Ms. Dortch:

SBC Communications Inc. ("SBC") submits this *ex parte* to clarify, or in the alternative, to amend the waiver relief it seeks in the foregoing docket.

Background. On December 9, 2003, SBC filed a petition seeking a waiver of Section 61.42(f) of the Commission's rules to permit the SBC incumbent LECs to include within price cap regulation any existing or future packet-switched offerings that SBC chooses to provide through those LECs.[1] SBC sought this waiver so that it could take advantage of the pricing flexibility afforded services subject to price caps to the extent it offers packet-switched services on a fully integrated basis.[2]

In its Petition, SBC explained that it did not previously include packet-switched services under price cap regulation because of the Commission's *1990 Price Cap Order*, which SBC

[1] SBC's waiver request does not apply to Digital Subscriber Line ("DSL") services. Further, SBC's waiver request does not apply to packet-switched services provided by SBC Advanced Solutions, Inc, ("ASI"), since the Commission has forborne from applying tariffing requirements to such services as long as ASI continued to operate pursuant to the structural separation requirements specified in the SBC/Ameritech Merger Order. *Memorandum Opinion and Order, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services* (CC Docket No. 01-337), 17 FCC Rcd. 27,000 (2002). Rather, this request applies only to those packet-switched services that SBC chooses to provide through its traditional incumbent LECs, and only to the extent, of course, that broader deregulatory actions by the Commission in the future do not render these waiver requests moot.

[2] SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules, WC Docket No. 03-250 (filed Dec. 9, 2003). SBC currently offers two packet-switched services through its local exchange companies: BPON and OPT-E-MAN. Because BPON qualifies as a broadband Internet Access service under the *Title I Order*, SBC intends to detariff that service. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, et al., CC Docket No. 02-33, et al., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Title I Order*"). BPON therefore is no longer subject to the waiver relief requested here.

interpreted to exclude *all* packet-switched services from price cap regulation.[3] SBC noted that other ILECs, including BellSouth and Verizon, took the opposite view and that BellSouth actually included its packet-switched services within price cap regulation and received pricing flexibility for those services.[4] SBC sought but was unable to obtain informal clarification from FCC staff as to which interpretation was correct. Given the competitiveness of the packet-switched market, it was essential that SBC have the flexibility to respond quickly to changing market conditions and customer needs, without the burdensome cost support and advance notice requirements applicable to non-price cap services. SBC thus filed its waiver petition to include packet-switched services under price cap regulation and subsequently take advantage of the pricing flexibility afforded price cap services.[5]

Seven months after SBC filed its waiver petition, Verizon filed a petition seeking a waiver of section 69.729 of the Commission's rules and paragraph 173 of the *Pricing Flexibility Order* to allow Verizon to exercise pricing flexibility for its existing and future advanced services that use packet technology in areas where the Commission has granted Verizon pricing flexibility for special access services.[6] According to Verizon, it was competitively disadvantaged in the marketplace for advanced services, vis-à-vis other ILECs. Specifically, Verizon explained that after it transferred its advanced services from its deregulated affiliate VADI to its telephone companies, pursuant to the *Bell Atlantic/GTE Merger Order*, it did not include those services under price cap regulation because the Commission was, at that time, considering the appropriate regulatory treatment for broadband services in the *Dom/Non-Dom proceeding*, including whether such services should be subject to price cap regulation.[7] Verizon noted that BellSouth had obtained pricing flexibility by including its advanced services under price caps and that SBC could offer such services on a detariffed basis through ASI.[8] Verizon argued that it required the same level of flexibility.

In response to Verizon's Petition, SBC filed supporting comments, while noting that Verizon's requested relief would afford Verizon an even greater degree of flexibility than requested under SBC's Waiver Petition, because Verizon could avoid the costs and burdens

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[3] SBC Petition at 2.

[4] *Id.* at 3. Verizon sought and obtained waivers of the Commission's price cap rules to exclude such services from price cap regulation. Importantly, Verizon chose to exclude its advanced services from price cap regulation whereas SBC believed its was legally obligated to do so under the Commission's *1990 Price Cap Order*.

[5] *Id.* at 4.

[6] Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services, WC Docket No. 04-246 (June 25, 2004).

[7] *Id.* at 4.

[8] *Id.* at 10.

associated with including its packet-based advanced services under price cap regulation.[9] SBC also requested that the Commission extend to other ILECs the same relief it grants Verizon. [10]

On October 14, 2005, the Commission granted Verizon a waiver of sections 1.774, 69.709, 69.711 and 69.727 of its rules to:

- Permit Verizon to exercise Phase I pricing flexibility for its packet-based advanced services in areas where it has received Phase I or Phase II pricing relief for special access services;
- Permit Verizon to exercise Phase I pricing flexibility for future packet-based advanced services in areas where it has obtained or seeks pricing flexibility; and
- Permit Verizon to apply for Phase II pricing flexibility for its packet-based advanced services in areas where it has obtained Phase II pricing flexibility for special access services. In such instances, Verizon would have to satisfy the Phase II competitive triggers for its packet-based advanced services.[11]

Discussion. The Commission may waive its rules if special circumstances warrant a deviation from those rules and such deviation would better serve the public interest than would strict adherence to the rules.[12] In the *Verizon Order*, the Commission found that special circumstances justified the limited waiver described above. SBC too has special circumstances warranting an extension of the same waiver to SBC. Indeed, granting SBC the same relief given to Verizon would raise no new or novel issues that would require the attention of the full Commission. SBC accordingly asks that the Wireline Competition Bureau grant this waiver forthwith.

There are special circumstances justifying the requested waiver relief. As an initial matter, SBC did not include its packet-switched services under price cap regulation because it interpreted the Commission's *1990 Price Cap Order* to expressly exclude such services from price caps. As advanced services flourished, SBC too needed some degree of pricing flexibility for these services to effectively compete. SBC thus sought and obtained tariffing relief for its advanced services affiliate, ASI, and for the most part, has offered its packet-switched services through that entity. However, it was not economically rational for SBC to offer some services, such as OPT-E-MAN, through ASI because ASI does not own any of its own transmission facilities. Thus, SBC has been providing these services under highly burdensome legacy tariffing requirements that are ill-suited for the competitive market in which these services are offered. Also for these services, SBC has been unable to respond to customer needs through contract tariffs, which is essential in a highly competitive marketplace.

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[9] Comments of SBC Communications Inc. in Support of Verizon's Petition for Waiver, WCB Docket No. 04-246 (Aug. 3, 2004).

[10] *Id.* at 4.

[11] *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246 (rel. Oct. 14, 2005) ("Verizon Order").

[12] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). 47 C. F.R. § 0.91.

Further, as the Commission is aware, maintaining a separate affiliate is costly and inefficient. In the wake of the *Title I Order*, which concluded that broadband Internet access services are information services, not telecommunications services, the cost/benefit calculus for retaining ASI has fundamentally changed. The vast majority of ASI's revenues will now be derived from services that will not be considered "telecommunication services" subject to Title II and thus need not be tariffed irrespective of whether they are provided by an SBC ILEC or ASI. SBC thus has dramatically reduced incentives to retain ASI as a separate affiliate, and plans to begin the process of phasing it out.[13] On a going forward basis, SBC is not currently planning to deploy any new packet-based advanced services through ASI, but will instead offer such services through its AT&T affiliate or the SBC LECs. Indeed, when section 272 requirements sunset for SBC in 2006, SBC is likely to deploy all such services through its LEC affiliates. SBC therefore has every bit as much a need for this waiver as did Verizon. Verizon does not have to incur the costs and inefficiencies of deploying advanced services in a separate affiliate in order to obtain the benefits of pricing flexibility; neither should SBC.

In addition to, extending the same relief to SBC is in the public interest. In the *Verizon Order*, the Commission determined that a partial grant of Verizon's waiver request would be consistent with its pricing flexibility policies and the broader public interest.[14] Specifically, in granting Verizon Phase I pricing flexibility in areas in which its price cap services qualified for Phase I or II relief, the Commission noted that such additional flexibility would enable Verizon to respond to competition through competitive pricing, without risking general price increases.[15] In that regard, the Commission recognized that Verizon's packet-based advanced services are not subject to price cap regulation, but concluded that the Part 61 tariffing requirements are sufficient to protect ILEC customers from unreasonable rate increases.[16] The Commission further relied on the fact that Verizon would be given Phase I pricing flexibility for packet-based advanced services only in areas in which it has satisfied the Phase I or II competitive triggers. It noted that in those areas, competitors have, by definition, made irreversible investment in facilities used to provide special access services, thereby providing additional assurances that its waiver would not result in unjust or unreasonable rates.[17]

The same analysis applies equally to SBC, warranting Phase I relief for SBC's advanced services. The Part 61 rules, subparts E and F, will effectively restrain SBC's ability to unreasonably increase rates. Further, the Phase I relief will only apply to advanced services offered by SBC in markets where SBC has qualified for or seeks pricing flexibility .

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[13] In the *Title I Order*, the Commission concluded that the transmission component of a facilities-based provider's offering of wireline broadband Internet access service to end users using its own transmission facilities is "telecommunications" and not a "telecommunication service" under the Act.

[14] *Verizon Order*, ¶15.

[15] *Id.*

[16] *Id.*

[17] *Id.* ¶16.

Importantly, the *Verizon Order* not only granted Verizon Phase I relief for its existing advanced services, but also its future advanced services. SBC is entitled to the same. So long as the SBC LECs have satisfied the Phase I or Phase II competitive showings for special access services in the subject areas, SBC should be entitled to exercise Phase I for its future advanced services in those areas. SBC acknowledges that in extending the waiver relief to Verizon's future advanced services, the Commission required Verizon to comply with its "new services rules," and in particular Section 69.729(a) and (b), as applicable. SBC commits to adhere to the same requirements.

With respect to Phase II relief, the Commission refused to grant Verizon Phase II relief for its advanced services without a competitive showing, even in areas where Verizon has qualified for Phase II relief for special access services.[18] The Commission concluded that the potential competitive harms of such a grant outweigh the potential competitive benefits. Given the significant regulatory relief afforded by Phase II relief, the Commission determined that satisfaction of the Phase II triggers for Verizon's advanced service is necessary to ensure that Verizon cannot exploit any market power it may have over a sustained period.[19] SBC is seeking the same relief, i.e. the ability to apply for Phase II relief for its advanced services, with the requisite Phase II competitive showing, in areas where it has already qualified for Phase I or Phase II relief for it special access services.

In short, there are no new or novel issues raised here. Like Verizon, special circumstances exist for SBC, warranting the pricing relief requested. Such relief "will promote competition for advanced services, resulting in more choices and better prices,"[20] and will eliminate unnecessary administrative and regulatory burdens. Accordingly, SBC requests that the Bureau, pursuant to its delegated authority, grant SBC a waiver to permit its SBC LECs to exercise Phase I pricing flexibility for its existing and future advanced services in areas where it has obtained Phase I and Phase II relief for special access services, and to apply for Phase II relief, by satisfying the Phase II competitive triggers, in areas where it has or may seek Phase II relief for special access services.

Sincerely,

/s/ Davida Grant
Davida Grant

Cc: Deena Shetler, FCC, via email
Marvin Sacks, FCC, via email

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[18] *Verizon Order*, ¶18.

[19] *Id*.

[20] *Id*. ¶9.